

Was the Corruption of Civil Rights Law Inevitable?

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I. THE CHANGING OBJECTIVE OF ANTIDISCRIMINATION LAW

A traditional and frequently stated purpose of the antidiscrimination laws is to increase the chances that a given job will be offered to the most qualified applicant for that position, without regard to the applicant's race, gender, age, or physical handicaps.¹ In other words, setting an ideal result of careers-open-to-talents, a goal of the act is to minimize the *number* of mistakes that are made (by the antimeritocratic use of the stated criteria).

This theory sees the law as performing a fine-tuning function, i.e., keeping hiring practices attuned to their proper function (of finding the most productive widget maker) and not deviating excessively in any direction because of improper personal considerations. The image of the paradigmatic wrongdoer, against whom the laws provide a remedy, is the firm which has hiring practices burdened with antimeritocratic prejudices, such as managers choosing "good old boys" in opposition to those who would, in fact, be best for the job at hand.

A happy implication of this theory is that antidiscrimination laws might be essentially costless, at least with respect to values that are clearly legitimate in their own right. If the most productive employees were selected more frequently, wages could be higher and consumer prices lower than they would otherwise be. The only loss

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1. The legislative history of the 1964 Civil Rights Act to this effect is noted in THOMAS SOWELL, *PREFERENTIAL POLICIES: AN INTERNATIONAL PERSPECTIVE* 104-05 (1990).

would be in failing to satisfy the "taste to discriminate" of managers, fellow employees, or customers, which may not be a legitimate taste to begin with, and may also be a taste that the antidiscrimination laws can help to change.

Epstein's book effectively demonstrates that the antidiscrimination laws have, in practice, deviated radically from this "fine-tuning" objective.² Prohibitions on disparate treatment of individuals on account of race have changed into de facto prohibitions on otherwise useful practices with disparate impact on minority individuals. And as the law has moved beyond the core case of race to encompass gender, age, and handicapped status, employers are increasingly urged to ignore (and thus either swallow or shift to others the effect of) genuine differences in the productivity of individuals.³

In short, contemporary law cannot realistically be seen as designed to adjust hiring practices so as to reduce the *number* of mistakes, defined as careers not effectively open to talents. The law has moved, more like a sledgehammer than a fine-tuning device, toward altering the *distribution* of mistakes, making sure that antimeritocratic decisions, although more frequent in number, are disproportionately visited on individuals within certain groups, i.e., whites, males, younger workers, and those without physical handicaps. From the earlier perspective of making hiring decisions more meritocratically accurate, the civil rights laws have been rather thoroughly corrupted.

As Epstein's book catalogues in some detail, the resulting regime can in no way be characterized as costless in terms of legitimate values. Real costs, both material and psychological, are incurred when jobs and employees throughout the economy are systematically mismatched.⁴ The administrative costs of policing the motives for so many hiring, promotion, and firing decisions are enormous.⁵ Employers are given an incentive to avoid hiring minorities and women with uncertain track records out of fear that they could become legal problems at the promotion and retention stages, and are also given an incentive to locate in regions and nations where racial minorities are less numerous.⁶ Wages become lower, and consumer prices higher, as firms are compelled to change their production structure to accommodate handicapped employees and to retain older workers who are less productive (but not in sufficiently palpable ways to guarantee inexpensive and certain victory in court).⁷

2. See RICHARD A. EPSTEIN, *FORBIDDEN GROUNDS: THE CASE AGAINST EMPLOYMENT DISCRIMINATION LAWS* (1992).

3. *Id.* at 206-41, 441-94.

4. *Id.* at 283-312 (arguing that Bona Fide Occupational Qualification (BFOQ) has been interpreted to exclude legitimate standards matching employees and jobs).

5. *Id.* at 259.

6. *Id.* at 262-63.

7. *Id.* at 441-94.

Epstein's book forces us to ask two questions about this phenomenon of a change in focus of the antidiscrimination laws. First, was it inevitable that the antidiscrimination laws would follow this course, i.e., is it hopeless to envision a return to a fine-tuning regime because a political slippery slope guarantees a reversion to a regime similar to the one we currently have? Second, if it was inevitable, should we live with the resulting costs, or bite the bullet and repeal antidiscrimination laws in the private economy? Although this Article cannot answer these two, very large, questions, it discusses considerations pertinent to such answers in the next two sections.

II. IS A RETURN TO A FINE-TUNING REGIME POSSIBLE?

An initial problem with a fine-tuning regime concerns the questionable need for such a system, given the existence of market incentives to resist racism and related prejudices. If racism is understood, in part, as holding false beliefs about the productivity of minority individuals, it is easy enough to see that market incentives are an excellent device for combatting racism. Employers who can learn to set aside their racism will make more money by having a more productive work force, and those employers who are constitutionally incapable of setting aside their prejudices will lose out competitively to those who are capable of doing so.⁸

Of course, as Epstein notes, competitive markets are not always permitted to operate. If firms fear that nondiscriminatory practices on their part will bring on unopposed private or union violence and state discrimination, they may be unwilling to be the first to integrate. Epstein suggests that this was a major problem with the Southern governments in place in 1964.⁹ It is not clear whether the same problem would exist at the present time, given the changes brought about in Southern politics by the effective extension of voting rights to blacks, but further empirical study of this issue would appear to be warranted.

Even with competitive markets, the incentives to eliminate racism are not complete. Markets efficiently allocate resources to accommodate tastes, and racism by employees, managers, and consumers can

8. See WALTER E. WILLIAMS, *THE STATE AGAINST BLACKS* 27 (1982).

9. See EPSTEIN, *supra* note 2, at 91-129.

be characterized as tastes. Moreover, race might be used as an inexpensive proxy for other nonracial traits.¹⁰ The important point, however, is to stress the inherent limits on the *size* of these problems. The “taste for racism” is disciplined by the fact that markets force people to pay for the tastes they hold from their own pockets. Consumers might break ties by buying American over Japanese television sets or cars, but very few will pay an unlimited penalty to vindicate their nationalist tastes.¹¹ Proxy racism also has inherent size limits because, if large numbers of qualified minorities are being overlooked, it will become increasingly expensive for employers to use race as a proxy for quality.

The most accurate statement would seem to be that competitive forces are an excellent device for avoiding *large* deviations from the principle of careers-open-to-talents. A governmental fine-tuning regime would have to be content with making rather small changes to a preexisting background that already had made most of the major changes for reasons of self-interest, at least in sectors where competitive industry was permitted to operate.

Is there reason to believe that collective action could successfully fine tune a system that was already calibrated to avoid large mistakes, or that such a collective regime would be willing to confine itself to such a modest task? Indeed, more broadly, is there some reason to believe that our society collectively would act so as to minimize a racism to which we as individuals were susceptible? In 1964, one might have viewed the question in essentially sectional terms: a majority of the nation was regulating the private actions of a regional minority. With the extension of voting rights and the general homogenization of the nation over the last thirty years, the idea of

10. Epstein notes that if some firms use race as a proxy for quality, the utility of that proxy will gradually decline as the higher quality nonminority employees are systematically removed from the pool. *See id.* at 31-41. The result is that a new firm beginning today would very likely not benefit from using race as a proxy, its utility for that end having already been exhausted by other firms. Epstein’s point seems important, but it does concede the earlier use by firms of race as a proxy.

11. Epstein argues that product markets and employment markets may be different in this respect, given the relatively “spot market” character of the former and the relatively long-term, “relational” character of the latter. *See id.* at 60-72. A racist might consider it more difficult to live with a member of the disfavored race on an ongoing basis, while she would be willing to buy her products. Indeed, such behavior need not always be racist in any obvious sense; there may simply be a cultural incompatibility between groups as they have evolved historically (one group preferring loud music and another quietude).

The formal point is still correct: the racist must pay for her racist tastes, and similarly a person who must have loud music that others find intolerable will have to pay for that taste. Markets not only reduce racism by putting a price on it; they also reduce cultural pluralism in any area where cultures have evolved in ways that directly clash. Where the clash of cultures is not externally patent, however, markets will put a price on (and thus discourage) gratuitous intolerance of what becomes seen as the “private” behavior of other races.

the Civil Rights Act as merely a cold war continuation of the Civil War seems less compelling. This fact squarely raises the question of exactly who is trying to regulate whom with national antidiscrimination laws, and why the regulating "who" is regarded as holding more accurate racial views than the regulated "whom."

Since racism largely involves false factual beliefs held by individuals because those beliefs are pleasing to racial vanity, the question essentially is whether collectivities will be better informed about the true productivity of minority and nonminority employees than will private employers. Unfortunately, collective action has always been conducive to false factual beliefs. When actions are taken collectively, the incentive of each individual to inform herself of the true state of affairs is extremely attenuated.¹² The chances that the collective action will be different if any one individual becomes well informed are slight, and most of the benefits of a wise decision (or costs of an unwise one) are externalized to persons other than the one deciding whether to become well informed.

This public choice problem explains the rational ignorance of collective actors but not their systematic tendency to embrace racist falsehoods as against others. Interethnic tensions, coupled with false beliefs and crude stereotypes, are exceptionally common phenomena all over the globe and down through history. This commonality in the face of otherwise radically diverse cultural circumstances suggests that there is something about human nature that perversely predisposes people to embrace racist falsehoods.

As I have written elsewhere, what people have in common is their biological nature, and sociobiology does indeed have a theory of racism.¹³ The selfish gene encourages us to be differentially sympathetic toward those genetically similar to ourselves.¹⁴ This is not to say that racist beliefs will necessarily be extremely strong or that they cannot be combatted by socialization. Certainly, relative to the differential sympathy one is likely to show toward one's own children or siblings, the genetic linkage among ethnic group members is highly attenuated.¹⁵ However, when it can be indulged on the cheap

12. See George Stigler, *The Theory of Economic Regulation*, BELL J. ECON. & MGMT. SCI. 3 (1971); Christopher T. Wonnell, *Economic Due Process and the Preservation of Competition*, 91 HASTINGS CONST. L.Q. 91 (1983).

13. See Christopher T. Wonnell, *Circumventing Racism: Confronting the Problem of the Affirmative Action Ideology*, 1989 B.Y.U. L. REV. 95, 103-11.

14. See PIERRE L. VAN DEN BERGHE, *THE ETHNIC PHENOMENON* 15 (1981); DANIEL G. FREEDMAN, *HUMAN SOCIOBIOLOGY: A HOLISTIC APPROACH* 137-38 (1979).

15. This point is stressed in Irwin Silverman, *Race, Race Differences, and Race*

and when counterpressures are absent, people will be inclined to lapse into their natural intraethnic sympathies. And there is nothing cheaper than choosing to embrace pleasing factual beliefs of one's racial superiority when deciding how to make collective decisions; one bears almost no personal cost from entertaining such false beliefs. This is a chilling point of intersection between public choice theory and sociobiology.

A metaphor drawn from the natural sciences may be helpful here. The tendency of collective action to turn racist seems to bear some similarity to the physical force of gravity. Relative to the other forces, gravity is exceptionally weak; it produces major effects such as holding the planets in their orbits only because very large numbers of atoms are all "pulling" space-time in the same direction.¹⁶ Similarly, each individual citizen may have only a small tendency toward racism, generated by the subconscious mind's crude analogy to the ingroup loyalty that helped our ancestors survive through primitive times. With collective action, however, racism will very likely be one of the few common denominators in which the predispositions of most people will be pulling in the same direction, creating a highly salient and identifiable majority passion.

Given this dynamic, it seems inevitable that collective action will be highly susceptible to the forces of racial politics and race-based rationalizations. At times, majority racism may be outweighed by minority racism, especially if the majority is divided along other dimensions or touched by guilt or feelings of sympathy. At other times, the majority race will reassert its own racial myths and prejudices. A politicized society with a large state sector making innumerable calls about the racial character of economic decisions is destined to be a society plagued by racial factions and intrigue. The balance of forces at any given time may affect which group's racial mythology serves as the temporary basis for policy. However, the idea that a roughly truthful picture of the factual potential of each individual could ever arise from such a poisonous atmosphere seems most implausible.

In short, a market economy, which removes many decisions from collective action dynamics, looks much better in the area of race relations when one considers the alternatives. Markets discipline racial mythology, forcing actors to avoid large mistakes based upon either bigoted views of racial inadequacy or "politically correct" wishful thinking that ethnicity and productivity are wholly uncorrelated. The political process makes it likely that racial myths will be taken for

Relations: Perspectives from Psychology and Sociobiology, in SOCIOBIOLOGY AND PSYCHOLOGY: IDEAS, ISSUES AND APPLICATIONS 205, 216-17 (1987).

16. See ROBERT MORRIS, *THE NATURE OF REALITY* 74 (1987).

facts, and unlike markets, there is little pressure disciplining the *size* of the mistakes that can be made on the basis of such mythologies.

Fine-tuning is not generally government's strong suit. The state can prosecute a war or ban fluorocarbons more effectively than it can make the nuanced, marginal judgments required in economic planning or employment markets. Collectivist fine-tuning in the racial area, with racisms of every variety competing for dominance in an atmosphere of rational ignorance on all sides, is actually a quite implausible notion. If not inevitable, it is surely unsurprising that the civil rights laws have moved away from any semblance of marginal fine-tuning and have themselves become a major instrument of racial politics.

III. SHOULD ANTIDISCRIMINATION LAWS FOR COMPETITIVE MARKETS BE REPEALED?

With characteristic courage, Epstein argues for the unthinkable: repealing all antidiscrimination laws governing competitive employment, including discrimination based upon race, gender, age, and handicaps.¹⁷ His case for the efficiency of this move is very strong, but few people would be moved to repeal civil rights laws because of considerations of economic efficiency. Whether because of the diminishing marginal utility of income, Rawlsian concerns for the resources of the least advantaged, or a conservative desire to include everyone in the system to avoid civil unrest, most people are willing to tolerate a lot of inefficiency if it brings racial minorities and other severely disadvantaged persons into the mainstream economy.

Unfortunately, there is considerable reason to believe that the long run effect of the civil rights laws will be to alienate the minority community from the mainstream society rather than to include it. The story told here — that civil rights laws may create large inefficiencies by mismatching employees and jobs, but that this mismatching is tolerable because it helps to promote social justice — is one that only an outsider to the system can believe for very long. Beneficiaries of the programs cannot be expected to believe that the meritocratic standards to which they have been partially exempted, but which they will periodically have brutally reimposed when the situation demands, are valid and important standards for maintaining a good society.¹⁸

17. See EPSTEIN, *supra* note 2, at 3.

18. See Wonnell, *supra* note 13, at 119-41.

A deep alienation from the core values and standards of the society, albeit disguised by the surface conservatism of any group nominally included in powerful institutions, is the predictable byproduct of a system whereby different races succeed in accord with different ideologies. It also makes it difficult to see how the minority underclass can become integrated into the mainstream society when minority opinion leaders to whom they might naturally look for guidance have themselves become so alienated from conventional standards and values.

One cannot be sanguine, therefore, about the long-run potential of civil rights laws to serve a conservatizing function. To be sure, the transition shock of repealing antidiscrimination laws would be enormous, a matter to which Epstein pays insufficient attention. Apart from the inevitable symbolic misinterpretation that repeal represents "open season" for discrimination, there would be quite tangible effects of repealing the laws. Persons who were hired, promoted, or retained to fill formal goals will often find themselves laid off or otherwise disadvantaged, especially as existing firms are forced to compete with new firms that have never built workforces with an eye toward satisfying bureaucratic requirements. The civil rights laws are responsible for an atrocious situation in which the only apparent alternatives are to allow the progressive alienation of minority opinion leaders from mainstream standards or to impose severe transition shocks upon minority individuals.

If the laws were to be repealed, something else would have to be done to include the disadvantaged in the mainstream society. Ideally, those initiatives should do as little damage to market principles as possible, both because that would help the programs work and because it would minimize the creation of yet more ideologies. For these reasons, educational vouchers and apprenticeship contracts might be worth trying as methods of enhancing the productivity of prospective minority employees.¹⁹ For the handicapped (and perhaps for the aged as well), Professor Cooter's proposal for a tax and subsidy or hiring credit regime appears promising.²⁰ It should not generate the same backlash that comparable programs would produce in the racial area, because the idea that the handicapped (and aged) are somewhat less productive and deserving of modest subsidies seems capable of being internalized by actual system participants. Child care vouchers would assist with the full integration of women

19. The benefits to minority children of educational vouchers are noted in THOMAS SOWELL, *INSIDE AMERICAN EDUCATION* 70-89, 300 (1993). I have discussed apprenticeship contracts in Christopher T. Wonnell, *The Contractual Disempowerment of Employees*, 46 *STAN. L. REV.* 87, 116-20 (1993).

20. See Robert D. Cooter, *Market Affirmative Action*, 31 *SAN DIEGO L. REV.* 133 (1994).

into the workforce. An exploration of these and other alternatives would obviously become a high priority if the antidiscrimination laws were to be repealed or significantly weakened.

